MAR 21 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 801

JACK SCHNEIDER

Petitioner

v.

THE PEOPLE OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS E. DEWEY
District Attorney
New York County

STANLEY H. FULD
Assistant District Attorney
Of Counsel

INDEX

PAGE

STATEMENT 1

INTRODUCTION 2

STATUTE INVOLVED 2

QUESTIONS PRESENTED 2

I.—The petitioner was tried for, and convicted of, the crime of coercion alleged in the indictment 3

A. There was no dismissal of the count charging coercion 4

B. The petitioner's guilt of coercion did not depend upon the commission of an assault either by himself or by his codefendants 6

C. The petitioner's conviction was based upon the acts charged in the indictment 7

II.—The trial was fair; petitioner's constitutional rights were not invaded 8

A. There was no attack upon the petitioner's religious, social, or political views 8

1. The court's charge to which no objection was taken was proper 9

B. The defense witness Quill was not "tried and convicted of radicalism" 10

III.—No federal question is presented to this Court 11

IV.—The petition for a writ of certiorari should be denied 15

Table of Cases Cited

PAGE

Capital City Dairy Co. v. Ohio (1901) 183 U. S. 238 13
Chicago, &c. Ry. Co. v. McGuire (1904) 196 U. S. 128 13

Dunn v. U. S. (1931) 284 U. S. 390 7

Herndon v. Georgia (1934) 295 U. S. 441 13

Lynch v. New York (1934) 293 U. S. 52 13

Mutual Life Ins. Co. v. McGrew (1903) 188 U. S. 291 13

People v. Berman (1934) 264 N. Y. 693, aff'g (1st Dept. 1934) 241 App. Div. 844 ..... 4, 6
People v. Cohen (1918) 223 N. Y. 406, cert. den. 248 U. S. 571 7
People v. Eichner (1st Dept. 1915) 168 App. Div. 200 7
People v. Haupt (1928) 247 N. Y. 369 7
People v. Irving (1884) 95 N. Y. 541 10
People v. Johnston (1920) 228 N. Y. 332 10
People v. Malkin (1928) 250 N. Y. 185 10
People v. Mullen (1900) 163 N. Y. 312 10
People v. Sherlock (1901) 166 N. Y. 180 12
People v. Sieke (1918) 222 N. Y. 611 12
People v. Wolf (1906) 183 N. Y. 464 4

Sasser v. U. S. (C. C. A. 5th Cir. 1928) 29 Fed. (2d) 76 cert. den. sub nom. Russell v. U. S., 279 U. S. 836 7

Whitney v. California (1926) 274 U. S. 357 14

Supreme Court of the United States

October Term, 1940

No. 801

JACK SCHNEIDER,
Petitioner,
v.
THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

The petitioner seeks the review of a judgment of the Court of General Sessions, New York County, convicting him of the crime of COERCION (Penal Law, § 530). He was sentenced to imprisonment for an indeterminate term in the Penitentiary of the City of New York (3950).* This judgment was affirmed by the Appellate Division of the Supreme Court of the State of New York, First Department (4048-50), and by the Court of Appeals of New York State.

The petitioner's application for a stay of execution pending decision on this petition was denied by Mr. Justice STONE on March 3, 1941, with the statement *"that the case is not an appropriate one for a stay."*

* References are to folios of the printed record.

Introduction

The petitioner and five others were indicted by a grand jury drawn for the Court of General Sessions of the County of New York, State of New York, and were charged with the crimes of coercion (Penal Law, § 530), of assault in the second degree (Penal Law, § 242) and of conspiracy (Penal Law, § 580). The crime of assault in the second degree is a felony; those of coercion and of conspiracy misdemeanors. After a trial lasting for five weeks, the jury acquitted four of the defendants, reported a disagreement as to a fifth, and convicted the petitioner of the crime of coercion.

Statute Involved

Section 530 of the Penal Law, which defines the crime of coercion, reads as follows:

> "A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,
>
> 1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,
>
> * * *
>
> 3. Uses or attempts the intimidation of such person by threats or force,
>
> Is guilty of a misdemeanor."

Questions Presented

The petitioner urges that he was denied due process and the equal protection of the laws (1) because he was convicted of a crime which was not alleged in the indictment and for which he was not tried, and (2) because the court suspended the constitutional safeguards applicable to criminal trials and permitted the jury to convict the petitioner solely because of his radical and religious views and affiliations.

I

The petitioner was tried for, and convicted of, the crime of coercion alleged in the indictment.

Since the petitioner's guilt was established clearly and beyond a reasonable doubt, no purpose would be served by reviewing the evidence in detail. Briefly, however, the proof showed that, on April 8, 1938, in the course of a strike called by the Fur Workers Union in New York City, one Jacob Friedlander, a somewhat apathetic union member, aged 62 years and employed by one of the fur manufacturing firms affected, was brought down to the union headquarters (222-33). There, the petitioner, the business agent of the union, ordered Friedlander to reveal certain information, such as the number of employees and the number of machines being used by his employer and the address of the foreman of the shop (223-34).[1]

When Friedlander told the petitioner that he could not impart the information demanded, Schneider told him (234-5):

> "this is the last chance I am going to give you. You are an old man and you cannot take it any more."

When Friedlander declined to take advantage of this "last chance," the petitioner summoned others and directed them to "make him [Friedlander] talk" (236). In a similar effort to obtain the desired data, these latter brutally beat and kicked the aged Friedlander (236-7, 245-52). The injuries which he received—including a cerebral concussion, and lacerations and contusions about the face

---

[1] In passing, we note that the presence of Friedlander and the petitioner Schneider together at the union headquarters at this time was vouched for by another witness, Albert Fitz, who testified that he had been questioned by Schneider on the same day about the same foreman (3367).

(679-80, 751)—were of such gravity that he was considered to be in danger of dying and was confined to a hospital for over three weeks (236-7, 245-52, 700-28, 751).

The conduct of the petitioner—his effort, through intimidation by threats of violence, to compel disclosure of information which Friedlander had a legal right to withhold—clearly constituted the crime of coercion and fully justified the judgment of conviction. [See *People* v. *Berman* (1934) 264 N. Y. 693, aff'g (1st Dept. 1934) 241 App. Div. 844.]

A. There was no dismissal of the count charging coercion.

Claim is made that the charge of coercion was dismissed because the petitioner's attorney was prevented from discussing that crime in his opening statement.

In opening to the jury counsel must confine themselves to the facts which they expect to prove, and it is the court's duty to keep them within that limit. [See *People* v. *Wolf* (1906) 183 N. Y. 464, 472-473.]

The petitioner's attorney, however, seemed intent upon treating matters foreign to the issues and the court was compelled upon several occasions to admonish him in that regard (see, *e. g.*, 115, 118). In the particular instance now singled out by the petitioner (Petitioner's Brief, pp. 5, 21), the defense attorney, after explaining that it was Schneider's duty "to take charge of the various activities of the union," had begun to elaborate by stating, "Mostly during the times when there are no strikes it is usual all the time—" (120). The court thereupon told counsel (120):

> "That would not be relevant in this case. Confine yourself to the counts of conspiracy and assault."

This was no direction that counsel refrain from discussing the charge of coercion. True, the word "coercion" itself was not used, but the context indicates that

the court was merely seeking to restrain the attorney from going beyond the issues presented by the indictment. A similar direction had previously been given, though on that occasion, the court requested defense counsel to "tell the Jury about the assault" (118). There was no need to refer to each of the charges being tried. The court simply selected a shorthand method of instructing counsel to keep within the bounds of relevancy.

Quite apart from that, however, it is patent that the defendant was not prevented from opening upon the charge of coercion. The defense to both was an alibi, that the petitioner was not at the scene of the crime, and counsel discoursed on that matter without interruption (131-3).

In addition, defense counsel affirmatively recognized, throughout the trial, that the coercion charge was still in the case and was being pressed. Thus, at the close of the People's case, he moved to dismiss "on the ground that no prima facie case had been made out by the People, as to the various charges of conspiracy, **coercion** and assault, as contained in this indictment" (758), and he repeated this motion at the end of the entire case (3526).

Moreover, the attorneys for both sides referred to the charge of coercion in their respective summations (3531, 3711, 3821, 3832-3). Thus, defense counsel told the jury (3531):

> "We have an indictment against six defendants. *They are charged with coercion, coercion exercised upon one Jacob Friedlander* to compel him to do something that he had a right to refrain from doing."

Finally, the court thoroughly covered the subject in its charge; it read section 530 of the Penal Law to the jury and told them that they could return a verdict "as to coercion" in any one of three different ways (3741-2, 3866, 3871-2).

In short, the court did not rule that the coercion charge was out of the case, nor did defense counsel conclude that such was the fact.

B. The petitioner's guilt of coercion did not depend upon the commission of an assault either by himself or by his codefendants.

The crime of coercion does not require the commission of an assault. Under the statute (Penal Law, § 530), one is guilty of coercion who "threatens * * * violence * * * or uses or attempts intimidation * * * by threats," for the purpose of compelling the victim to do an act which he has the right to abstain from doing. There is no necessity either that the victim do the act in question or that the defendant carry out his threat by actual use of force. [See *People* v. *Berman* (1934) 264 N. Y. 693, aff'g (1st Dept. 1934) 241 App. Div. 844.] In the *Berman* case, a delegate to the Retail Clothing Salesmen Union was tried for, and convicted of, coercion. The evidence disclosed that, upon being informed by a non-striking union member that he was "through with the Union," the defendant replied (p. 693):

> "If you feel that way, don't forget a sign is bound to fall on you, you are bound to get cut up, or probably a truck is going to run over you. Don't blame us, don't blame the union, that will be the workings of your own boss * * *."

None of those things happened, and yet the Court of Appeals upheld the judgment of conviction.

Nor is there anything in the facts herein which requires that the petitioner's guilt of coercion be predicated upon the commission of an assault either by himself or by someone else. On the contrary, his threatening attitude and conduct toward Friedlander when the two of them were alone in Schneider's office, presented in and by itself alone every element necessary to constitute the crime.

Consequently, the fact that all six defendants, including the petitioner, were acquitted of assault is without bearing or effect upon Schneider's guilt of coercion.

In passing and although not strictly germane to the issues, it should be noted that the jury's verdict was inconsistent neither in fact nor in law. In convicting the petitioner and acquitting the others, the jury were but giving concrete effect to the relative weight of the evidence against each of the defendants, for while Friedlander's account of the petitioner's criminal conduct was strongly substantiated by the testimony of the witness Fitz and by the proven falsity of Schneider's alibi, the evidence which he gave against the others stood more or less by itself and was opposed by less demonstrably false defenses. Indeed, the acquittals may well have been the result of a reasonable doubt as to the identities of the petitioner's associates in the threatening and beating of Friedlander. But even if the verdict be regarded as illogical, that fact would not affect the result. [See *People* v. *Cohen* (1918) 223 N. Y. 406, cert. den. 248 U. S. 571; *People* v. *Eichner* (1st Dept. 1915) 168 App. Div. 200; *Sasser* v. *United States* (C. C. A. 5th Cir. 1928) 29 Fed. (2d) 76, 78, cert. den. *sub nom. Russell* v. *United States,* 279 U. S. 836.]

Similarly, since the petitioner's guilt of assault could be predicated only upon a finding that he had induced the others to attack Friedlander, his acquittal of the conspiracy and assault charges may merely have indicated that the jury were not convinced that he had given orders for an actual beating. [See *People* v. *Haupt* (1928) 247 N. Y. 369, 371; *Dunn* v. *United States* (1931) 284 U. S. 390, 394.]

C. The petitioner's conviction was based upon the acts charged in the indictment.

The meeting between Friedlander and the petitioner took place on April 8, 1938. However, evidence that Friedlander had been followed by union representatives on April 6, two days before, was introduced by the People

to support the charge of conspiracy; indeed, the very fact that Friedlander was so "followed and trailed" is set forth in the indictment as one of the overt acts committed in furtherance of the conspiracy (12). Nothing in the record affords even the slightest basis for the supposition that the petitioner's conviction was sought, and his guilt predicated, upon the events of April 6 rather than upon his own conduct on April 8.

II

The trial was fair; petitioner's constitutional rights were not invaded.

It is contended that the trial court suspended the constitutional guarantees applicable to criminal cases and thereby permitted the jury to convict the petitioner of coercion because of his religion and of his radical views and affiliations in social and political fields (see Petitioner's Brief, pp. 18 *et seq.*). Significantly, no objection upon constitutional grounds was interposed at the trial to any of the items now urged as being violative of the due process and equal protection of the laws clauses of the Federal Constitution, and, with but one exception, none of those items was so attacked in the Court of Appeals.

A. There was no attack upon the petitioner's religious, social, or political views.

The claim is made that the petitioner was "singled out for attack by virtue of the fact that he was a Jew, an alien, and particularly for his alleged radical political and social views and connections * * *" (Petition, p. 7).

There is nothing in the record to indicate what Schneider's religion was—other than a gratuitous remark interjected by his own counsel at the trial (2665). But, even if he be a Jew, it is clear that he was not prejudiced thereby

on the trial. Three of his codefendants who were acquitted were likewise Jewish (Rau, Gru, Lauber), and the jury disagreed as to a fourth Jew, Mencher. More than that, the petitioner himself was acquitted of assault, a felony. and convicted only of coercion, a misdemeanor. Friedlander and most of the principal witnesses for the People (Schwartz, Streit, Fitz, Kolvek) were Jewish, as were several of the jurors (*cf.* 53-4). Furthermore, at the time the application for a stay of execution was being argued before Mr. Justice STONE, *defense counsel expressly repudiated the claim that the petitioner's religion had militated against him in any way.*

The record does not disclose the nature of the petitioner's views upon political or social subjects, or even, as the petitioner recites (Petition, p. 2), that he was a member of the American Labor Party. It does appear that he was an alien, but it cannot be said that that prejudiced him, since the jury acquitted his codefendant, Gru, who also was an alien (2464).

1. The court's charge, to which no objection was taken, was proper.

The court instructed the jury that the union "is not on trial" and that (3866)

> "a man has a right to belong to any party or church that he may select, or any union."

The trial judge then told them that their verdict was to be based upon the law, saying (3866-7):

> "That is the law of assault, the law of conspiracy and the law of coercion, and I certainly think that you ladies and gentlemen in your deliberations will not inquire in this case and on the evidence you have heard, as to the political, social or religious affiliations of a man in connection with this case, except in so far as these inquiries may help you to determine where the truth lies."

The instruction, it seems to us, was intended for the benefit of petitioner and his codefendants. Defense counsel, in his summation, had mentioned "prejudices [and] personalities" (3702), which might have a tendency to react upon his clients, and the court was desirous that they should play no part in the case. Though the judge might have phrased the thought more clearly, his purpose was to make certain that the jurors would not permit any extraneous considerations to predispose them against any of the defendants. The statement that there were to be no inquiries into the affiliations of anyone "except in so far as these inquiries may help you to determine where the truth lies" (3867), manifestly, was not a direction that the jury consider that subject; rather, it was an admonition that the views of witnesses, as disclosed by their examination, should be weighed only in so far as was necessary for the jurors to determine whether self-interest or bias for the defense may have colored the testimony of those witnesses.

In any event, though, *no objection or exception was taken to the charge;* more, although four of the defendants were of the same race and religion as the petitioner, and although all were, for all that appears, possessed of the same social and political affiliations, the jury acquitted them of all of the charges and the petitioner of two of them.

B. The defense witness Quill was not "tried and convicted of radicalism."

The petitioner states that his witness Michael Quill, as well as he, was "tried and convicted of radicalism" (Petitioner's Brief, p. 8).

Quill, the petitioner's chief alibi witness, was properly cross-examined concerning his union affiliations (797-8), in order to establish his bias for the petitioner Schneider as a fellow member of the C.I.O. (795-6).

Questions as to whether or not he had used, or had advocated the use of, force or violence in strikes (830-2, 834-5, 839) were permissible as testing his credibility. [See *People* v. *Malkin* (1928) 250 N. Y. 185, 193; *People* v. *Johnston* (1920) 228 N. Y. 332, 340.] In addition, all of the questions were answered in the negative so that, even if deemed improper, they cannot be regarded as prejudicial. [See *People* v. *Mullen* (1900) 163 N. Y. 312 319; *People* v. *Irving* (1884) 95 N. Y. 541, 543.]

III

No federal question is presented to this Court.

Examination of the petitioner's claims, on the merits, has revealed their lack of substance. Conduct of court and prosecution was proper, and the petitioner was not deprived of his constitutional rights to due process or to the equal protection of the laws. He was convicted of that crime of coercion which was set forth in the indictment and for which he had been tried. Neither he nor any of his witnesses were subjected to attack for their religious, social, or political beliefs or affiliations.

Moreover, considering the case upon purely procedural grounds, no federal question is presented to this Court.

At the trial, the petitioner made no objection, either directly or by inference, that he had in any way been denied the full benefit of his constitutional rights.

Similarly before the Court of Appeals, although numerous assignments of error were urged (Petitioner's Court of Appeals Brief, Point VI, pp. 63-66; Point VII, pp. 67-73; Point VIII, pp. 74-78; Point X, pp. 81-114), the petitioner did not pretend that any of them, save one, involved a federal question. In that one instance, he claimed a denial of due process upon the limited and specific ground that the trial judge, in his charge, had committed prejudicial error by appealing to the racial, social,

and political prejudices of the jury (Petitioner's Court of Appeals Brief, Point IX, pp. 78-81). The point was without merit (see, *supra*, pp. 9-10); in addition, it appeared that it could not be considered by the Court of Appeals because it had not been raised upon the trial below. [Respondent's Court of Appeals Brief, Point VII E, pp. 61-63; *People* v. *Sieke* (1918) 222 N. Y. 611; *People* v. *Sherlock* (1901) 166 N. Y. 180, 183.] [2]

On January 9, 1941, the petitioner applied to Mr. Justice STONE for a stay of execution and, in his argument, petitioner's counsel once more relied solely upon the alleged error in the trial court's charge.

Thereafter, the petitioner moved in the Court of Appeals for an amendment of the remittitur so as to have it recite that the Court had "overruled the **contentions** of the appellant" that the trial was conducted in violation of the due process clause and the equal protection of the laws clause of the Fourteenth Amendment, and had "held that his trial and conviction were in conformity with the federal Constitution" and that "the trial including the charge of the trial judge" did not violate any constitutional provision (Petitioner's Notice of Motion to Amend Remittitur, p. 1).

By order dated January 24, 1941, the Court of Appeals amended its remittitur, but with a significant divergence from the wording proposed by the petitioner. Instead of reciting that the Court had "overruled the **contentions** of

---

[2] The suggestion that the dissent—placed upon the ground "that there were errors committed at the trial which in their [the two judges'] opinion were clearly prejudicial"—amounted to "a statement that *petitioner did not have a fair trial*" (Petitioner's Brief, p. 24), is without the slightest basis. In the Court of Appeals, the petitioner had relied upon a large number of alleged errors arising out of the reception and exclusion of evidence, the district attorney's summation and conduct, the judge's charge, and like matters. Consequently, it seems evident that the two dissenting judges had in mind one or more of those items, rather than any alleged deprivation of due process or other violation of constitutional right.

the appellant''—as requested in the petitioner's moving papers—the order stated that the Court had ''overruled the **contention** of the appellant that his trial and conviction'' were violative of the constitutional rights of due process and of the equal protection of the laws and had **''refused to pass upon the effect of any parts of the charge to which no exceptions were taken.''**

That order clearly establishes that the Court of Appeals had not passed upon the point—now raised for the first time—that the conduct of the trial as a whole was violative of due process. Moreover, when considered in the light of the question actually presented to that Court, the order affirmatively shows that the Court had refused to pass upon the sole constitutional issue advanced before it by the petitioner, namely, the propriety of an excerpt from the charge (see, *supra*, pp. 9-10; Petitioner's Court of Appeals Brief, Point IX, pp. 78-81). True enough, another part of his brief (Point X, pp. 81-114) dealt with the alleged unfairness of the trial, but not even the slightest suggestion was made that due process clause or the equal protection of the laws clause had been violated thereby, and—unlike the constitutional argument contained in Point IX (Petitioner's Court of Appeals Brief, pp. 80-81)—the only cases cited and relied upon represented decisions of state courts (Petitioner's Court of Appeals Brief, p. 114).

In short, therefore, since no federal question whatever was raised at the trial, and since the Court of Appeals refused to pass upon the sole federal question urged before it, this Court will not assume jurisdiction. [See *Herndon* v. *Georgia* (1934) 295 U. S. 441; *Chicago, &c. Ry. Co.* v. *McGuire* (1904) 196 U. S. 128, 131-132; *Mutual Life Ins. Co.* v. *McGrew* (1903) 188 U. S. 291; *Capital City Dairy Co.* v. *Ohio* (1901) 183 U. S. 238, 248; see, also, *Lynch* v. *New York* (1934) 293 U. S. 52, 54-55.]

Nor does there remain any other ground upon which to base jurisdiction. This Court has consistently rejected the proposition that it may consider the entire record

in determining whether a fair trial was had, where appropriate objection or exception has not been made at the trial. Thus, in *Whitney* v. *California* (1926) 274 U. S. 357, Mr. Justice SANFORD wrote (pp. 362-363):

> "We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course our review is to be confined to that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise, that any other federal question was presented in and either expressly or necessarily decided by that court. [Cases cited.] It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. *Dewey* v. *Des Moines, supra,* 199; *Keokuk & Hamilton Bridge Co.* v. *Illinois, supra,* 634. And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here—not presented in or passed upon by the Court of Appeal—whether apart from the constitutionality of the Syndicalism Act, the judgment of the Superior Court, by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law. [Cases cited.]"

IV

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS E. DEWEY
District Attorney
New York County

STANLEY H. FULD
Assistant District Attorney
Of Counsel.

March, 1941.